APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2946

Kris Alan Hahn,
Appellant,

v.

United States of America,

Appellee.

Appeal from U.S. District Court for
the District of Minnesota - Minneapolis
0:09-cv-00675-MJD

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 16, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-2946

Kris Alan Hahn,
Petitioner - Appellant

v.

United States of America,
Respondent - Appellee

Appeal from U.S. District Court for
the District of Minnesota - Minneapolis
(0:09-cv-00675-MJD)

JUDGMENT

Before SMITH, BOWMAN, SHEPHERD, Circuit Judges

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

December 17, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX C

Crim. File No. 08-95 (MJD)
Civil Case 0:09-cv-00675-MJD

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

KRIS ALAN HAHN,
Defendant/Petitioner.

MEMORANDUM OPINION AND ORDER

Jeffrey S. Paulsen and Tricia A. Tingle, Assistant U.S. Attorneys for Plaintiff/Respondent.

Kevin M. O'Brien, Counsel for Defendant/Petitioner.

I. INTRODUCTION

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct his Sentence Pursuant to 28 U.S.C. § 2255 (Doc. No. 32) and his Motion to Recuse [Doc. No. 36].

II. BACKGROUND

On March 25, 2008, a felony information was filed charging Petitioner with one count of production of child pornography in violation of 18 U.S.C. §§ 2251(a) and 2251(e). On April 29, 2008, Petitioner entered into a Plea Agreement by which he pleaded guilty to

the one-count information.[1] At the Plea Hearing, Petitioner confirmed that he understood that he was being charged by Information, and that he understood he had the right to have a grand jury determine whether probable cause existed as to the charge of producing child pornography. (Plea Transcript, p. 4.) He orally waived his right to a grand jury, and he also signed a written waiver of Indictment. (*Id.*)

Pursuant to the terms of the Plea Agreement, the parties agreed that on or before December 6, 2006, the Petitioner enticed K.S.H., a minor over the age of 12, to pose for photographs which lasciviously displayed her genitals or pubic area. (P.T., p. 20.) The parties further agreed that the Petitioner took the pictures and that he later sent the pictures to K.S.H. over the internet. (*Id.*) The parties also stipulated to certain sentencing guideline calculations. The Petitioner also specifically acknowledged that he would receive a sentence of at least 180 months, because of the applicable statutory mini-mum sentence. (*Id.*, p. 6, 9.) At the Plea Hearing, the Court inquired as follows:

> Q: Well, understand that if you enter a plea here and I accept it, the mandatory minimum sentence is at least 15 years, 15 years is the starting point, it does not go below that. Do you understand that?
>
> A: Yes, I do.

(P.T. p. 10.)

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[1] The Petitioner was first charged in state court with Criminal Sexual Conduct in the First Degree for having sexual intercourse with the minor victim K.S.H. Bauer also represented Petitioner on that charge.

During his plea colloquy, Petitioner was questioned as to whether he understood and agreed to the terms of the Plea Agreement. The Petitioner responded that he did understand the terms and agreed to such terms. (Id .. p. 12.) The Petitioner was also extensively advised of the constitutional rights that he would give up by entering into a guilty plea. (*Id* .. p. 12-14.) The Court also inquired of the Petitioner as to whether he received any threats or promises in exchange for his plea of guilty, to which he responded "No, sir." (*Id.* p. 16.)

Thereafter, the Petitioner confirmed that he was knowingly, voluntarily and intelligently waiving those rights. (*Id.* p. 18.) To ensure that the plea was knowing and voluntary, the Court inquired of Petitioner as to whether he was taking any prescription medications, and if so, what medications he was currently taking. In response, the Petitioner indicated that he took medication for high cholesterol, GERD, aspirin and Tylenol. (P.T. p. 16.) The Court asked the Petitioner if he was clearheaded, to which he responded "Yes I am." (*Id.* p. 17.)

On January 23, 2009, Petitioner was sentenced to a term of imprisonment of 210 months, which was the high end of the applicable advisory guideline range.

Petitioner now brings this *pro se* motion to vacate, set aside or correct his sentence arguing: (1) ineffective assistance of counsel; (2) the district court was without jurisdiction to accept Petitioner's guilty plea; and (3) Petitioner's plea was not knowing and voluntary. Shortly after filing this habeas petition, Petitioner filed a motion to recuse. The basis for this motion is that his defense counsel, Thomas Bauer, allegedly told him that the prosecutor called him in tears as she was upset over the way the federal prosecutor's office was going handle this matter, and

because Bauer allegedly told him that Bauer was aware of this Court's position on pornography, and that Bauer had in fact watch pornographic movies with the Court.

The Court appointed counsel for Petitioner with respect to his motion to recuse and his habeas petition. Despite the appointment of counsel, the Court has agreed to consider Petitioner's *pro se* motions and memoranda filed in support thereof.

III. DISCUSSION

A. Motion to Recuse

Standard

Title 28 U.S.C. § 455 provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding ...

The Eighth Circuit has determined that disqualification under § 455 is required "if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *United States v. Tucker*. 78 F.3d 1313, 1324 (8th Cir. 1996) (quoting *Gray v. Univ. of Ark.*. 883 F.2d 1394, 1398 (8th Cir. 1989). To determine whether recusal is necessary, the court applies an objective standard.

Id. "It is the appearance of bias or partiality that matters here, not actual bias." Id. District judges are also charged with the duty "to avoid unnecessarily disqualifying himself." *United States v. Walker*. 920 F.2d 513,516 (8th Cir. 1990). "A recusal or disqualification motion is committed to the sound discretion of the trial judge and the standard of review on appeal is whether the judge abused his or her discretion." *Id.* (citation omitted). In *Walker*. the court affirmed the district court's decision not to recuse even though the district court had engaged in an ex parte contact with the prosecution, because there was a long time lapse between said contact and the actual sentencing, and that nothing in the judge's overall conduct demonstrated that he was legally oppressive or hostile toward the defendant. *Id.* at 517.

In determining whether recusal is warranted, Judge Breyer, writing for the First Circuit noted:

> [W]hen considering disqualification, the district court is *not* to use the standard of "Caesar's wife," the standard of mere suspicion. That is because the disqualification decision must reflect *not only* the need to secure the public confidence through proceedings that appear impartial, *but also* the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons, perhaps to obtain a judge more to their liking.

In re Allied-Signal. Inc .. 891 F.2d 967, 970 (1st Cir. 1989).

In *Nichols v. Alley*. the Tenth Circuit listed a number of areas that are frequently alleged as a basis for recusal that usually do not warrant it,

including rumor, speculation and similar non-factual matters, baseless personal attacks on the judge and threats or other attempts to intimidate the judge. 71 F.3d 347,351 (10th Cir. 1995).

The Court finds that the allegations made in Petitioner's motion fall into the categories of rumor/speculation and/or an attempt to intimidate the judge. Other than his self-serving testimony, Petitioner did not provide any evidence to support the assertions made in this motion. Prior counsel, Thomas Bauer, provided sworn testimony to the Court in which he acknowledged working in the same office as the undersigned approximately thirty years ago. (6/02/09 Hearing Transcript, p. 10.) He further testified that he has not socialized with the undersigned during the last fifteen year period, other than possibly exchanging words at professional gatherings. (*Id*., p. 11-12.) He further denied telling Petitioner that he watched pornographic films with the undersigned at his home, and that he has never been at the undersigned's home, nor does he know where the undersigned lives. (*Id.*, p. 9, 4/27/09 Hearing Transcript, p. 7.)

In addition to the unsubstantiated allegations made concerning the relationship between Bauer and this Court, Petitioner has also made no showing that this Court made any improper rulings that were affected by any alleged bias. In fact, Petitioner conceded that this Court ruled in his favor as to a contested sentencing issue.

Based on this record, the Court finds no basis in fact or in the law upon which a reasonable person would question this Court's impartiality. Given the baselessness of this motion, the Court finds that current counsel for the Petitioner breached his duty of candor to the Court by adopting Petitioner's motion to recuse in his memorandum of law filed May 29, 2009. The Court acknowledges that it is

counsel's duty to represent the interests of his client. Concomitant with that duty, however, is the duty of candor to the Court. This duty requires that counsel not promote, in any way, motions of a client that have absolutely no basis in law or in fact. Yet in this case, counsel adopted Petitioner's *pro se* motion to recuse in his memorandum of law filed on May 29, 2209 (Doc. No. 55), even though Bauer had already denied the Petitioner's allegations in sworn testimony before the Court. (4/27/09 Hearing Transcript, p. 7.) With no evidence supporting the motion, other than Petitioner's self-serving allegations, counsel's apparent adoption of the motion to recuse did not serve the interests of justice, rather it served only to spread utterly baseless rumors.

The motion to recuse will be denied.

B. Habeas Petition

Under 28 U.S.C. § 2255, [a] prisoner in custody under sentence . . . claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Failure to raise an issue on direct appeal constitutes a procedural default, and it may bar a petitioner from raising the issue for the first time in a § 2255 motion. *Dejan v. United States*. 208 F.3d 682, 685 (8th Cir. 2000) (citing *Bousley v. United States*, 523 U.S. 614, 621-22 (1998); *Matthews v. United States*, 114 F.3d 112, 113 (8th Cir. 1997); *Anderson v. United States*, 25 F.3d 704, 706 (8th Cir. 1994) (finding that a motion under 28 U.S.C. § 2255 does not substitute for a direct appeal).

Petitioner did not file an appeal after sentencing, therefore Petitioner is procedurally defaulted from raising the claims in this § 2255 motion. Dejan, 208 F.3d at 685; Matthews, 114 F.3d at 113. However a

court may excuse a default where the petitioner demonstrates: (1) a cause that would excuse the default; and (2) prejudice or actual innocence. *McNeal v. United States*. 249 F.3d 747, 749 (8th Cir. 2001) (citation omitted); *Matthews*, 114 F.3d at 113. Petitioner does not address cause, prejudice, or actual innocence in his § 2255 motion. Thus, the Court cannot excuse the procedural default on these bases.

Notwithstanding the above, Petitioner may still be able to excuse the procedural default if he demonstrates ineffective assistance of counsel. Claims of ineffective assistance of counsel may fulfill both the cause and prejudice requirements to excuse a procedurally defaulted claim. *Boysiewick v. Schriro*, 179 F.3d 616,619 (8th Cir. 1999). In order to prove ineffective assistance of counsel, a petitioner must demonstrate: (1) counsel performed deficiently; and (2) that counsel's deficient performance prejudiced the decision against him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

When examining the first prong of the *Strickland* test, a court may consider counsel's performance deficient if it fell outside "the wide range of reasonable professional assistance." *Id.* at 689. However, it is strongly presumed that counsel's performance falls within that "wide range of reasonable professional assistance." *Id.* A petitioner may satisfy *Strickland*'s second prong by showing that but for the counsel's errors, the court would have made a different decision in petitioner's case. *Id.* at 691. The analysis does not need to start with the first prong. When the petitioner cannot show prejudice under the second prong, there is no need to look to the reasonableness of counsel's behavior under the first prong. *Id.* at 697.

Petitioner claims that he received ineffective assistance of counsel from attorney Thomas Bauer.

He claims that Bauer was not in tune with his case from the beginning, and that he was hard to reach on the phone when the Petitioner needed to speak with him. Bauer only visited him twice in jail, and did not show him any paperwork as to motions he had filed on Petitioner's behalf. He also claims that Bauer used scare tactics to get him to enter a plea of guilty in this case.

In response to this Petition, Bauer provided sworn testimony to the Court concerning his representation of Petitioner. At the June 2, 2009 hearing, Bauer testified that prior to his being charged by Information in this case, he met with Petitioner and discussed the evidence against him. (6/02/09 Hearing Transcript, p.32.) Bauer testified that Petitioner told him not to worry about what may be contained on Petitioner's computer, as he had erased all the pictures depicting child pornography. (*Id.*) Bauer testified that he strategically chose not to hire a computer forensic expert to aid in his defense. (*Id.* p. 33, 35-36.) The Petitioner had told Bauer that his computer was "full of pornography", thus in order to keep the focus off of the computer, Bauer believed it best to proceed with a plea agreement, especially in light of the fact that the Petitioner had admitted to having sex with K.S.H. (*Id.* p. 33-34.)

Bauer further testified that he had regular contact with Petitioner prior to his plea in this case. (*Id.* p. 34-35.) When the plea agreement and waiver of indictment were sent to Bauer, Bauer testified that he went over those documents in great detail with Petitioner prior to his plea hearing. (*Id.* p. 35.) Bauer also testified that he never told Petitioner he could work out a deal so that Petitioner would serve less than a fifteen year sentence on the federal charge. (*Id.* p. 37.)

Prior to sentencing, Bauer recommended to Petitioner that he retain the services of another

attorney, Rick Mattox. (*Id.* p. 38.) Petitioner testified that he had a fair amount of confidence in Mr. Mattox and that Mr. Mattox was always available to take Petitioner's calls. (*Id.*, p. 62-63.) Petitioner further admitted that he had the opportunity to talk with Mr. Mattox about withdrawing his plea, and that he did talk about this issue with Mr. Mattox, but that he decided to go ahead with sentencing. (*Id.* p. 61-62.)

To prevail on his claim of ineffective assistance of counsel, Petitioner must show that Bauer's conduct in recommending that Petitioner enter into the Plea Agreement fell below an objective standard of reasonableness, and he must show prejudice in that but for Bauer's errors, he would not have entered into a Plea Agreement with the government.

Despite his many complaints of Bauer's performance, Petitioner has not shown that if he had received different legal advice, he would not have entered into a plea agreement and proceeded to trial. Furthermore, based on the record in this case, the Court finds that counsel's conduct was objectively reasonable.

As mentioned previously, the Petitioner admitted to the charged conduct during his plea colloquy. (P.T. p. 20.) He also stated that he was satisfied with the representation provided by Bauer, that Bauer went over the evidence with him, as well as trial strategies and defenses. (*Id.* p. 17-18.) There is evidence in the record that Bauer fully advised Petitioner of all available defenses, his right to have a grand jury review the charges against him and other pretrial strategies prior to the plea hearing. Petitioner now alleges that Bauer erred in not obtaining the services of a computer forensic expert, suggesting that the pictures upon which the federal charges were based were photo-shopped. As discussed previously, however, Bauer testified that he chose not to pursue

this strategy based on Petitioner's representation that he had child pornography on his computer other than the pictures that are the subject of the charged offense, and because of Petitioner's admissions of having sex with the minor victim. (6/02/09 T., p. 33.)

Petitioner also argues that this Court did not have jurisdiction to accept Petitioner's guilty plea for two reasons: 1) the inadequacy of counsel undercuts the competence and jurisdiction of this Court; and 2) Petitioner did not properly waive his right to be prosecuted by an indictment.[2] As discussed above, Petitioner's claim of ineffective assistance of counsel is without merit.

There is also no merit to the claim that Petitioner did not properly waive his right to be prosecuted by an indictment. It is Petitioner's position that an indictment must be issued before it can be waived. In this case, an indictment was never returned by a grand jury.

Rule 7(b) of the Federal Rules of Criminal Procedure provides:

> An offense punishable by imprisonment for more than one year may be prosecuted by information if the defendant—in open court and after being advised of the nature of the charge and of the defendant's rights- waives prosecution by indictment.

There is nothing in this rule which requires that an indictment must first be returned before it can be waived. In addition, where a constitutional provision confers a right, such as a right to be confronted by witnesses and to be charged by indictment, such

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[2] The Court will address this argument, even though appointed counsel did not adopt such argument in his memorandum of law filed on Petitioner's behalf.

right can be waived. *Barkman v. Sanford*, 168 F.2d 592, 593 (5th Cir.) *cert. denied* 332 U.S. 816, 68 S.Ct. 155, 92 L.Ed. 393 (Nov. 10, 1947).

Finally, Petitioner claims that his plea was involuntary and unknowing. The record does not support this claim, however. As noted above, during his plea colloquy, the Petitioner was advised of the constitutional rights he was entitled to, but would give up, if he entered a plea of guilty to the crime charged. The Petitioner was also asked if he understood those rights, and he indicated to the Court that he did. He also informed the Court that no threats or promises were made which would have influenced his decision to enter a guilty plea, and that he was clear-headed. (P.T., p. 17.) Finally, he stated the his decision to enter a plea of guilty was done voluntarily, knowingly and intelligently. (P.T., p. 18.)

Petitioner now asserts that he was not clear-headed during his plea hearing, as he had taken two Ativans that morning, which is a prescription drug used to treat anxiety disorders. (*Id.* p. 50.) At his plea hearing, Petitioner did not inform the Court that he was taking, or had taken, this prescription drug. In fact, he stated that he was clear-headed. (P.T., p. 17.) In addition, Petitioner did not submit any evidence to the Court that he has ever been prescribed Ativan. There is thus no evidence, other than his self-serving testimony, to support Petitioner's claim that his plea was not knowing or voluntary.

Because Petitioner's claims fail to meet the applicable legal standards, the Petition must be denied.

Based on all the files, records, and proceedings herein, it is HEREBY ORDERED that Petitioner's Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Doc. No. 32] is DENIED. The

Petitioner's Motion to Recuse [Doc. No. 36] is DENIED.

Date: July 1, 2009

/s/Michael J. Davis
Michael J. Davis
Chief Judge
United States District Court